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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARIE MANGINE, Plaintiff and Appellant, v. DON BALL et al., Defendants and Respondents.	B285059 and B286055 (Los Angeles County Super. Ct. No. BC468719)

APPEALS from orders of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Marie Mangine, in pro. per., for Plaintiff and Appellant.

Craig Mordoh for Defendants and Respondents.

Marie Mangine, representing herself in this court as she did in the trial court, appeals the denial of her motions for judgment notwithstanding the verdict and for a new trial following the July 6, 2017 entry of judgment on the jury's special verdict in favor of her landlords, Ilene Ball, as an individual and trustee of the Ball Family Trust; Steve Binder, as an individual and trustee of the Binder Family Trust; Sharon Binder, as an individual and trustee of the Binder Family Trust; and Michael Ball (collectively Ball/Binder parties), on Mangine's cause of action for failure to maintain her rental unit in accordance with applicable building, housing and health codes. In her appeal (case no. B285059), Mangine principally contends she is entitled to judgment notwithstanding the verdict or, alternatively, a new trial, because, contrary to the jury's findings, the unrebutted evidence at trial established that the Ball/Binder parties did not comply with governing code requirements.

In a separate appeal (case no. B286055), Mangine challenges the trial court's denial of her motion to strike or tax costs, which resulted in an award of $2,215 to the Ball/Binder parties as the prevailing parties in the litigation. Mangine contends, because the Ball/Binder parties' memorandum of costs, seeking recovery of "[m]otions and filing fees," was not filed within 15 days of the initial judgment entered in this case—a judgment we reversed in a prior appeal (*Mangine v. Ball* (Nov. 4, 2015, B257377) [nonpub. opn.])—the request for costs was untimely. Mangine also contends the Ball/Binder parties, in a confidential settlement agreement resolving that claim, waived their right to claim any costs related to her cause of action for harassment, as alleged in the first amended complaint.

We affirm the denial of Mangine's postjudgment motions, as well as the denial of her motion to strike or tax costs.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Mangine's Pleadings, the Harassment Trial and the Prior Appeal*

Mangine rented and lived in an apartment in an 11-unit building on Holloway Drive in West Hollywood from June 2007 until July or August 2011. In April 2011 Mangine was served with a three-day notice to quit and then an unlawful detainer action for unpaid rent from October 2010 through April 2011. Following a two-day trial the court found there was an agreement between Mangine and her landlord that no rent would be demanded until outstanding habitability issues were abated. As a result, the court found no rent was due for any period prior to April 1, 2011. The court also found that Mangine had presented credible evidence of substantial defects in the property, including a number of items identified in a Los Angeles County Housing Department "Official Inspection Report," dated April 26, 2011. Based on this substantial breach of the implied warranty of habitability, the court reduced Mangine's rental obligation by 50 percent for April 1, 2011 forward. (See *Mangine v. Ball*, *supra*, B257377.)

On September 1, 2011 Mangine sued the Ball/Binder parties for damages, including excess rent paid, for violating West Hollywood Municipal Code sections 17.56.010(a)(3) and 17.68.010(d)[1] by failing to maintain her apartment in accordance

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[1] West Hollywood Municipal Code section 17.56.010(a)(3), part of the West Hollywood Rent Stabilization Ordinance (RSO), provides, "All rental units, at a minimum, shall be: [¶]

with applicable building, housing and health codes or in a habitable condition. The trial court sustained the Ball/Binder parties' demurrer on the ground an adjustment in rent under the West Hollywood Municipal Code had to be sought through the Rent Stabilization Department, which Mangine had failed to do. The court granted Mangine leave to amend her complaint.

On February 21, 2012 Mangine filed her first amended complaint alleging, in addition to the first cause of action for violations of West Hollywood Municipal Code sections 17.56.010(a)(3) and 17.68.010(d), that the Ball/Binder parties had harassed her by refusing to accept rent payments and removing housing services after she complained to authorities about the housing defects, thereby violating her right to quiet enjoyment and use of the rental property, protected by West Hollywood Municipal Code section 17.52.00, and had committed unfair business practices in violation of Business and Professions Code section 17200 et seq. The Ball/Binder parties answered the harassment claims and again demurred to the habitability claim. The court sustained without leave to amend the demurrer to the cause of action for failure to maintain the rental unit, noting

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. . . Maintained in accordance with all applicable building, housing and health codes."

West Hollywood Municipal Code section 17.68.010(d) authorizes a civil action by "[a]ny person" to enforce the provisions of the RSO and provides violators are liable for actual damages suffered by the aggrieved party, "or for statutory damages in the sum of one thousand dollars ($1,000.00), whichever is greater, and for punitive damages." The prevailing party may also recover attorney fees and costs "as may be determined by the court."

Mangine still did not allege she had first sought relief from the Rent Stabilization Department. Mangine's remaining claims proceeded to trial; the court found for the Ball/Binder parties; and judgment was entered in their favor on April 29, 2014.

Mangine timely appealed the April 2014 judgment, challenging only the court's order sustaining the demurrer to her damage claim for failure to maintain her rental unit in accordance with applicable building, housing and health codes. We held Mangine had adequately alleged there were defects and habitability issues with her apartment, including mold and unsanitary hallways, and, because she was seeking damages, not a rent adjustment, she was not required to allege she had applied to the Rent Stabilization Department to state a cause of action. (*Mangine v. Ball*, *supra*, B257377.) We reversed the judgment and directed the trial court to vacate its order sustaining the demurrer to the first cause of action of the first amended complaint and to enter a new order overruling the demurrer to that cause of action.[2]

2. *Trial of the Failure To Maintain Claim*

A jury trial was held on June 20 and 21, 2017. Testifying during Mangine's case-in-chief pursuant to Evidence Code

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[2] Prior to the bench trial on the harassment claims, Mangine moved to enforce a purported settlement agreement between her and the Ball/Binder parties resolving those claims or, in the alternative, for leave to file a second amended complaint adding a cause of action for breach of settlement agreement. The court denied the motion. We affirmed that order because Mangine had not provided a record on appeal that was adequate for meaningful review. We expressed no opinion as to whether Mangine should be permitted on remand to amend her complaint to allege breach of contract.

section 776, defendant Michael Ball conceded he had received a notice or citation from the health department asking that he test for mold, determine if there was water intrusion into Mangine's shower and make several minor repairs in the laundry room. Following that notice, Ball testified, a certified mold inspector examined Mangine's shower and found no evidence of moisture within the ceiling cavity. The inspector recommended cleaning the ceiling with a moldicide and repainting it, which Ball reported had been done.

Ball also acknowledged receipt of a citation from the South Coast Air Quality Management District (SCAQMD) requesting he test for asbestos in the building. Testing revealed no airborne asbestos but did disclose asbestos in the building. Ball had remedial work done and reported the results to SCAQMD. SCAQMD also asked that Ball clean air ducts in Mangine's and another tenant's units. The individual hired for the job ultimately declined to do the work once he learned Mangine and Ball were involved in litigation.

The jury returned a special verdict in favor of the Ball/Binder parties, answering "no" to the question whether any of the defendants had "fail[ed] to maintain Plaintiff Marie Mangine's rental unit in accordance with all applicable building, housing and health codes." Judgment was entered on July 6, 2017 in favor of defendants.

3. *Postjudgment Proceedings*

On July 21, 2017, 15 days after entry of judgment in their favor, the Ball/Binder parties filed a memorandum of costs seeking, as the prevailing parties, costs incurred in the trial court

during the litigation.[3] Mangine moved to strike or tax costs, arguing the Ball/Binder's memorandum of costs was untimely. In a reply filed in support of her motion to strike or tax costs, Mangine additionally suggested any costs incurred in connection with her harassment claim had been waived pursuant to a confidential settlement agreement between the parties. The trial court denied the motion.

For her part, following entry of judgment in favor of defendants, Mangine moved for a new trial and for judgment notwithstanding the verdict, contending the undisputed evidence at trial (Michael Ball's testimony) proved the Ball/Binder parties had not maintained their rental property in accordance with all applicable building, housing and health codes and thus contradicted the jury's special verdict.

Mangine also argued in support of her new trial motion that the court had improperly responded to two questions posed by the jury. The court had instructed, to establish her claim, "Plaintiff must prove that her rental unit was not maintained in accordance with the applicable building, housing and health codes." During deliberations the jury first asked, "With reference to 'building, housing, and health codes,' are those evidence that should have been presented by plaintiff or are they laws that we would have access to?" The court, after conferring with counsel and Mangine, responded, "The 'building, housing and health codes' are the general violations claimed and alleged by Plaintiff. Plaintiff submitted no further specific 'building, housing and health code' violation references as a basis for her claim against

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[3] This court had awarded Mangine her costs on appeal in the prior appeal.

Defendants. You—the jury—decide if Plaintiff has presented to you a specific and particular violation and that she has presented sufficient evidence of that specific violation. Plaintiff alone has the burden of proof to prove a specific violation." The jury also asked, "Does a finding of 'failure to maintain' require a documented violation of the 'building, housing, and health codes?'" The court responded, "A 'jury finding' requires the jury to decide whether or not 'the evidence,' as presented is enough to satisfy Plaintiff's burden of proof as required by law as stated in the instructions. Reread CACI #203 and CACI 107."

The court denied both motions. With respect to Mangine's challenge to the sufficiency of the evidence to support the jury's verdict, the court explained that evidence of a citation by a governmental agency was not the same as proof of a violation of a building, housing or health code. As for its answers to the jury's questions, the court stated the answers were not erroneous. "In both questions, the jurors sought clarification of and were reminded that Plaintiff has the burden of proving the elements of her case."

DISCUSSION

1. *Standard of Review*

On appeal from the denial of a motion for judgment notwithstanding the verdict, an appellate court generally reviews the record de novo and makes an independent determination whether there is any substantial evidence, contradicted or uncontradicted, to support the jury's findings. (*Sweatman v. Department of Veteran Affairs* (2001) 25 Cal.4th 62, 68 ["A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial

evidence in support. . . . [¶] . . . As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion"]; accord, *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770.) "If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

However, "there is a conceptual and substantive distinction within the substantial evidence analysis depending on who has the burden of proof on a particular issue, which party prevailed on that issue and who appealed." (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965.) "Where an issue subject to appellate review turns on a failure of proof at trial, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law." (*Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership* (2015) 238 Cal.App.4th 370, 390; accord, *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466.) "'Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached," and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Sonic Manufacturing Technologies, Inc.*, at p. 466.) "The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment." (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013)

218 Cal.App.4th 828, 838.) ""All conflicts, therefore, must be resolved in favor of the respondent."" (*Ibid.*)

"The denial of a new trial motion is reviewed for an abuse of discretion, except that a trial court's factual determinations are reviewed under the substantial evidence test." (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 514, fn. 7.) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict . . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.) ""The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse."" (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 748.)

2. *The Record on Appeal Does Not Support Mangine's Argument There Was Undisputed Evidence Her Rental Unit Was Not Maintained in Accordance with All Applicable Building, Housing and Health Codes*

Mangine's motions for judgment notwithstanding the verdict and for new trial were based in substantial part on her contention that uncontradicted testimony by Michael Ball compelled a verdict in her favor. Mangine's argument is doubly flawed.

First, the reporter's transcript designated on appeal by Mangine included only Ball's testimony, although minute orders indicate that Mangine and Ann Marie Nelsen, another tenant in the building, also testified. Without transcripts of their testimony or a suitable substitute, we cannot determine what actually occurred at trial or evaluate whether the jury's finding was inconsistent with the evidence presented. (Cal. Rules of

Court, rule 8.120(b) ["if an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings in the form of one of the following: [¶] (1) A reporter's transcript under rule 8.130; [¶] (2) An agreed statement under rule 8.134; or [¶] (3) A settled statement under rule 8.137"]; see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141 [it is appellant's burden to provide an adequate record to assess any claimed error]; *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 [in most cases involving the substantial evidence or abuse of discretion standard of review, "a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable"]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448 ["[t]he absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion"]; see also *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 [appellant's failure to include a transcript or a settled statement of relevant portions of the trial precluded consideration of the merits of the appeal].)

Second, to prove a violation of West Hollywood Municipal Code section 17.56.010(a)(3), it was Mangine's burden to present evidence that the various claimed defects in her unit constituted building, housing or health code violations. She failed to carry that burden. To be sure, Ball testified he had received "notices" or "citations" from the health department and SCAQMD requiring him to investigate and, if necessary, remediate certain potentially defective conditions in Mangine's apartment, including water intrusion, mold and asbestos. But copies of those documents were not introduced into evidence, and no other

evidence was presented—either through expert witnesses or requests for judicial notice of any governing building, housing and health codes—that the conditions identified in the citations, as described in Ball's testimony, violated applicable building or health codes.

It may be, as Mangine argues, a jury could infer from the fact citations had been issued by two regulatory bodies that the conditions identified violated the law. But even if reasonable, such an inference is not compelled by the evidence in this case, particularly where, as here, Ball also testified the tests for water intrusion, mold and airborne asbestos were all negative. As a result, viewing all factual matters most favorably to the prevailing parties and in support of the judgment, the trial court's denial of the motions for judgment notwithstanding the verdict and for new trial on the ground of insufficient evidence must be affirmed.[4]

3. *The Trial Court Did Not Improperly Instruct the Jury During Deliberations*

Mangine also contends she was entitled to a new trial because the court's responses to the jury's questions during

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[4] Similarly, to the extent Mangine sought to set aside or vacate the judgment in favor of the Ball/Binder parties pursuant to Code of Civil Procedure section 663, subdivision 1, on the ground the jury's special verdict was "not consistent with or not supported by the facts," the absence of evidence, let alone conclusive evidence, equating a "citation" with a violation of an applicable building, housing or health code fully justified denial of Mangine's motion. (See *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 477 ["'[a] motion to vacate lies only where a "different judgment" is compelled by the facts'"]; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.)

deliberations were incorrect and constituted prejudicial error. (See generally Code Civ. Proc., § 657, subd. 7 [new trial may be granted based on "[e]rror in law, occurring at the trial and excepted to by the party making the application" that materially affected the substantial rights of the moving party]; *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580 ["[a] judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the [reviewing] court shall be of the opinion that the error complained of has resulted in a miscarriage of justice'"].)

As discussed, the court instructed the jury that, to establish her claim that the Ball/Binder parties violated West Hollywood Municipal Code section 17.56.010(a)(3), "Plaintiff must prove that her rental unit was not maintained in accordance with the applicable building, housing and health codes." The court also instructed the jury concerning its obligation to decide the factual issues based only on the evidence presented: "You must decide what the facts are in this case only from the evidence you have seen or heard during the trial, including any exhibits that I admit into evidence. Sworn testimony, documents, or anything else may be admitted into evidence." (CACI No. 5002.) The court further instructed, "Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion." (CACI No. 202.) And the court instructed the jury with CACI No. 107, identifying the factors to consider in deciding whether to believe a witness's testimony, and CACI No. 203, regarding the ability of each party to provide evidence: "If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence."

Against the backdrop of these Judicial Council-approved instructions, the court's responses to the jury's two questions during deliberations were entirely proper. When the jury asked if Mangine should have presented evidence of the building, housing or health codes at issue, "or are they laws that we would have access to," the court correctly responded that the jury had to decide if Mangine had presented sufficient evidence of a particular code violation to satisfy her burden of proof.[5] That is an accurate statement of the law. Mangine's argument that the court failed to address the actual question presented—whether the jury could review housing or health codes even if they were not part of the evidence presented in the case—lacks merit. The court correctly instructed the jury it had to decide the case based on the evidence admitted at trial.

In response to the second question, whether a finding of failure to maintain required a "documented violation" of an applicable building, housing or health code, the court explained it

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[5] In its order denying the motion for new trial, the court stated its response to the jury's question was given "after consultation with the parties." (See generally *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 787 [defendants were estopped from asserting instructional error on appeal because they acquiesced to that instruction in the trial court].) Mangine insists in her opening brief that, while it was true the court spoke to the parties before responding to the question, she proposed different language and objected to the response as given. These assertions are not supported by citation to the record. (See *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1162 [argument not supported by appropriate citations to the material facts in the record may be deemed forfeited].)

was for the jury to decide whether the evidence presented was sufficient to satisfy Mangine's burden of proof "as required by law as stated in the instructions." Again, that is an accurate statement of the law.[6] Without directly challenging the substance of the court's answer, Mangine argues the court's suggestion that the jury reread CACI Nos. 107, regarding the assessment of witness credibility, and 203, concerning the presentation of weaker evidence by a party capable of producing stronger evidence, was misleading, and the court instead should have directed the jurors to CACI No. 106, which describes the kinds of evidence the jury could consider. But the court had already instructed the jury with CACI No. 5002, the "concluding instruction" that contains the same language concerning the various types of evidence as identified in CACI No. 106, one of the standard form "pretrial instructions." Under the circumstances here, omission of a specific reference to an instruction previously given in responding to the jury question was not error. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 97 [when the original instructions given by the court are full and complete, the court has discretion to determine what additional explanations are sufficient to satisfy a jury's request for information]; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1136-1137 [no error arises from a court's choice to reread certain instructions and not others in response to jury requests for further information, "so long as the original instructions themselves do not constitute

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[6] The court again noted in denying the motion for new trial that this response was given after consultation with the parties. See footnote 5, above.

incorrect statements of law"]; *People v. Pierce* (1962) 207 Cal.App.2d 526, 528 [in responding to a jury question, it is not error to reread particular instructions without repeating other instructions previously given]; see also *Kumelauskas v. Cozzi* (1961) 191 Cal.App.2d 572, 575.)

4. *The Memorandum of Costs Was Timely Filed*

Mangine does not dispute that the Ball/Binder parties are the prevailing parties entitled to recover litigation costs as a matter of right. (Code Civ. Proc., § 1032, subd. (b).) Instead, in her motion to strike or tax costs Mangine asserted that the Ball/Binder parties' right to costs as prevailing parties began only when the remittitur was issued on January 15, 2016, following this court's November 2015 reversal of the initial judgment in favor of the Ball/Binder parties in *Mangine v. Ball*, *supra*, B257377, and that all items detailed in their memorandum of costs predated our issuance of the remittitur. Because the Ball/Binder parties did not seek recovery of those cost items within 15 days after the date of service of the notice of entry of the initial judgment on April 29, 2014, as required by California Rules of Court, rule 3.1700(a)(1), Mangine argued, the time to claim those costs had expired.

The trial court properly rejected this argument.[7] After a judgment is reversed on appeal, the issue of trial costs is "'set at large.'" (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th

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[7] The Ball/Binder parties' opposition to the motion to tax or strike costs was not filed until five court days before the hearing, rather than nine court days as required by Code of Civil Procedure section 1005, subdivision (b). The trial court disregarded the untimely opposition and considered Mangine's motion unopposed.

1033, 1053; accord, *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284; *Purdy v. Johnson* (1929) 100 Cal.App. 416, 420.) That is, when the judgment fails and the matter is remanded for trial, the issues of prevailing party and the appropriate award of costs begin anew. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1237-1238 ["[t]he effect of an unqualified reversal is to vacate the judgment and leave the case 'at large' for further proceedings, including retrial, as if it had never been tried and no judgment had been entered"].) If costs had been awarded to the Ball/Binder parties at the time of the initial judgment, that award would have necessarily been reversed with our decision reversing the judgment: "An order awarding costs falls with a reversal of the judgment on which it is based." (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.) Similarly, the time to file a memorandum of costs under California Rules of Court, rule 3.1700(a)(1), following reversal, remand, retrial and entry of a new judgment, as to all recoverable costs incurred by the prevailing parties in the litigation, begins to run with service of notice of entry of the new judgment.

5. *Mangine Failed To Present Any Competent Evidence the Ball/Binder Parties Waived Their Right To Recover Costs as the Prevailing Parties in the Litigation*

On the final page of a reply memorandum filed in support of her motion to strike or tax costs, Mangine stated, "Moreover, the harassment claims are subject to a settlement agreement between the parties in 2016, the terms and conditions of which are confidential." Mangine did not provide the court with a copy of the purported agreement, did not describe any of its terms in a declaration or elsewhere in her papers in the trial court, and

failed to specify how the agreement was relevant to the issue of the prevailing parties' costs.

On appeal Mangine now asserts that, by entering into the 2016 settlement agreement, the Ball/Binder parties waived their right to recover any costs relating to the harassment claim alleged in the first amended complaint. Because all of the items listed in the memorandum of costs were incurred in connection with those claims, Mangine continues, those costs were properly subject to her motion to strike or tax costs. Mangine then argues, "Once the trial court was on notice of the existence of the settlement agreement, it had a duty to adhere to its terms, but it did not." [8]

Mangine's argument is based on a misunderstanding of the respective roles of the court and the parties in litigation. To the extent Mangine claimed the Ball/Binder parties had contractually agreed to waive their right to recover litigation costs as the prevailing parties, it was incumbent on her to provide competent evidence of such an agreement. (See Evid. Code, §§ 500 ["[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"], 550, subd. (b) ["[t]he burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact"]; see also *Gintel v. Green* (1958) 165 Cal.App.2d 723, 726 ["[a] party who holds the affirmative of an issue must produce evidence to prove it, and he is defeated if

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[8] In its order denying the motion the court did not mention Mangine's reply memorandum except to note that Mangine had not waived a timeliness objection to the Ball/Binder parties' opposition memorandum.

no evidence is given on the issue by either side"].) She failed to do so.

DISPOSITION

The court's orders denying Mangine's postjudgment motions and her motion to strike or tax costs are affirmed. The Ball/Binder parties are to recover their costs in this appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.